

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CV-05-0254 JP/WDS
CR-01-1616 JP

JESUS FALLS,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court sua sponte on Defendant's notice of the denial by the Court of Appeals for the Tenth Circuit of his motion to recall mandate, and for preliminary consideration of his motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255 filed March 7, 2005. 28 U.S.C. § 2255 R. 4(b). In his § 2255 motion, Defendant asserts several claims of ineffective assistance of counsel. He also contends that his sentence is illegal under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, --- U.S. ---, 124 S. Ct. 2531 (2004). The stay imposed by order of March 30, 2005, will be lifted.

Defendant's *Apprendi* claim is procedurally barred because he did not raise the claim on appeal. See *United States v. Falls*, No. 03-2137, 2004 WL 407039 (10th Cir. Mar. 5, 2004). "A § 2255 motion is not available to test the legality of a matter which should have been raised on direct appeal." *United States v. Cox*, 83 F.3d 336, 341 (10th Cir. 1996) (citing *United States v. Frady*, 456 U.S. 152, 167-68 (1982)). The substance of the motion should be examined, however, if the Court "can best serve the interests of judicial efficiency, conservation of judicial resources, and orderly and prompt administration of justice by . . . ruling on the merits, even though the . . . procedural bar

would also apply.” *United States v. Allen*, 16 F.3d 377, 379 (10th Cir. 1994). The Court will consider the merits of Defendant’s *Apprendi* claim.

The Supreme Court in *Apprendi* held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490. Defendant was convicted on Counts I and II of a superseding indictment charging conspiracy and distribution of 50 grams and more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A). At the time of his conviction, the statutory maximum penalty was life in prison. *See* § 841(b)(1)(A)(iii). Defendant’s prison sentence of 151 months did not exceed the statutory maximum. Defendant’s *Apprendi* claim will be dismissed.

No relief is available on Defendant’s claim under *Blakely v. Washington*, --- U.S. ---, 124 S. Ct. 2531 (2004). As noted in *United States v. Price*, 400 F.3d 844, 849 (10th Cir. 2005), “*Blakely* does not apply retroactively to convictions that were already final . . . [on] June 24, 2004.” Defendant’s conviction became final on June 5, 2004, ninety days after the Tenth Circuit affirmed the conviction. *See United States v. Willis*, 202 F.3d 1279, 1280 (10th Cir. 2000). Nor is relief available under the subsequent decision in *United States v. Booker*, --- U.S. ---, 125 S. Ct. 738 (2005). The *Booker* ruling applies only to cases that were pending or on direct review at the time of the decision. *See Booker*, --- U.S. at ---, 125 S. Ct. at 769. Defendant’s conviction became final before *Booker* was decided, and he may not rely on *Booker* to challenge his sentence in this collateral proceeding. The Court will dismiss Defendant’s *Blakely* claim.

IT IS THEREFORE ORDERED that the stay imposed by order of March 30, 2005, is LIFTED;

IT IS FURTHER ORDERED that Defendant’s claims (§ 18(d)-(e)) under *Apprendi v. New*

Jersey, 530 U.S. 466 (2000), and *Blakely v. Washington*, --- U.S. ---, 124 S. Ct. 2531 (2004), are DISMISSED with prejudice;

IT IS FURTHER ORDERED that the Clerk shall forward to the United States of America a copy of Defendant's motion to vacate, set aside or correct sentence and supporting papers and exhibits, if any, together with a certified copy of this Order;

IT IS FURTHER ORDERED that, within twenty-three days of receipt of this Order, the United States answer Defendant's claims of ineffective assistance of counsel (§ 18(a)-(c)) in his motion to vacate, set aside or correct sentence.



SENIOR UNITED STATES DISTRICT JUDGE